

Before the  
Federal Communications Commission  
Washington, D.C. 20554

ORIGINAL

In the Matter of )  
 )  
Amendment of Section 73.202(b), )  
Table of allotments, )  
FM Broadcast Stations )  
(Lewisville, Gainesville, Robinson, )  
Corsicana, Jacksboro, and )  
Mineral Wells, Texas) )

MM Docket No. 97-91  
RM-8854

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

To: The Commission

**REPLY TO OPPOSITION TO APPLICATION FOR REVIEW**

Jerry Snyder and Associates, Inc. ("Snyder"), by its counsel, hereby respectfully submits its Reply to the Opposition to the Application for Review of the *Report and Order*, DA 98-1650, released August 21, 1998, in the above-captioned proceeding (the "*Order*") filed by Heftel Broadcasting Corporation ("Heftel") on October 9, 1998.<sup>1</sup>

**I. Heftel Has Violated 47 C.F.R. § 1.48.**

Heftel had a choice to either file a Petition for Reconsideration or an Application for Review, but not both. 47 C.F.R. § 1.104(b). Heftel filed a Petition for Reconsideration (the "Petition") and a 25 page consolidated opposition (the "Opposition") to the applications for review. The Petition contained entirely different legal arguments than the Opposition. Heftel simultaneously filed a "Request" with the Opposition that the Petition be incorporated by reference as part of its legal argument in the Opposition. This incorporation brings Heftel's legal

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<sup>1</sup>Pursuant to Sections 1.115(d) and 1.4 of the FCC's rules, the reply is due to be filed no later than October 22, 1998.

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argument in the Opposition to 43 pages. The Request thus violates 47 C.F.R. § 1.48. See, *Belo Broadcasting Corporation*, 61 FCC 2d. 10 (1976). The Petition therefore must be dismissed.

## **II. Heftel's Petition for Rulemaking Violates the FCC's Pinewood<sup>2</sup> Doctrine.**

At p. 6 of its Opposition, Heftel admits that its Petition for Rulemaking in MM Docket No. 97-91 (the 97-91 Petition) was an untimely counterproposal in the *Farmersville* proceeding.<sup>3</sup> By the time Heftel's 97-91 Petition was filed, related changes of allotments in ten different communities were under consideration in *Farmersville*. In the *Farmersville Order*, Heftel's Petition was rejected.<sup>4</sup> Snyder argued in its Application for Review that under the *Pinewood* doctrine, Heftel should have been required to refile its Petition for Rulemaking and it should not have received *nunc pro tunc* treatment. In its Opposition at pp. 7-8,<sup>5</sup> Heftel argues that the *Pinewood* doctrine did not preclude *nunc pro tunc* treatment of Heftel's 97-91 Petition because "it related exclusively to which Class A channel would be allotted" to Jacksboro.

In fact, Heftel's 97-91 Petition proposed changes in allotments in five communities, other than just Jacksboro.<sup>6</sup> Moreover, the Petition involved three substitutions of channels occupied by existing licensees, in addition to the nine licensed stations to be modified already proposed in *Farmersville*. It is Commission policy not to consider a rulemaking petition involving

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<sup>2</sup>*Pinewood, South Carolina*, 5 FCC Rcd. 7609 (1990) ("Pinewood").

<sup>3</sup>*Farmersville, Texas*, 11 FCC Rcd. 1170 (Allocations Branch, 1996) ("Farmersville").

<sup>4</sup>*Farmersville*, 12 FCC Rcd. 4099, 4102 n. 7 (1997) (the "*Farmersville Order*").

<sup>5</sup>Heftel ignores Snyder's citation of *Ironton, Missouri*, 13 FCC Rcd. 6584.

<sup>6</sup>Lewisville, Gainesville, Robinson, Corsicana, and Mineral Wells.

substitution of more than two channels occupied by existing FCC licensees. *Columbus, Nebraska*, 59 RR 2d. 1185 (1986) (“*Columbus*”).<sup>7</sup>

At pp. 8-9, Heftel makes the absurd argument that *Pinewood* is inapposite because in *Pinewood* the Commission acted in 3 ½ months and in *Farmersville* the rejection of the Heftel Petition took place some five months after Heftel’s 97-97 Petition was filed. *Nunc pro tunc* treatment of Heftel’s 97-91 Petition did two things contrary to the public interest. First, it gave a rulemaking petition, filed in violation of Section 1.420(d), not only cut-off protection as against Snyder’s application, but also as against any other application for one-step upgrade or petition for rulemaking that could have been filed after July 26, 1996 and before the *Farmersville Order* of January 17, 1997. Second, it opened a classic Pandora’s box situation because now any petitioner can cite the *Order* as precedent for *nunc pro tunc* treatment protection of a late filed counterproposal, as against any subsequent application or rulemaking petition. Finally, at pp. 13-20 of its Opposition, Heftel not only seeks *nunc pro tunc* reconsideration of the staff’s acceptance of Snyder’s application, but also reconsideration of the finality of numerous decisions of the Mass Media Bureau involving allotments. These decisions are binding precedent under delegated authority.

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<sup>7</sup>Snyder’s March 10, 1997, Motion to Dismiss Heftel’s Rulemaking Petition which cited both *Pinewood* and *Columbus* was never mentioned in the *Order*.

Moreover, the relief Heftel seeks is properly a petition for rulemaking to reverse Commission precedent.<sup>8</sup> In *Modification Recon.*<sup>9</sup> the FCC rejected the concept that by simply claiming a first local service and then counting population to be served that alone supported a proposed allotment to a well served suburb of a major market. The FCC has had sad experience with sham proposals. A sham proposal in the FM rulemaking process involves first specifying a reference point that meets the requisite tests.<sup>10</sup> Then, once the channel is allotted, that reference point being no longer a restriction, Heftel probably can put the station in downtown Dallas if it can find a site and doesn't have to meet the spacings required were Snyder's application granted.<sup>11</sup> Heftel avoided the problem of showing independence of Lewisville from Dallas because it submitted an exhibit in its 97-10 Petition which showed that from its "proposed" transmitter location Heftel would only cover 11.3% of the Dallas urbanized area. Heftel therein did not commit itself to applying only for than specified "proposed" transmitter location, as it did regarding Robinson in its May 5, 1997, comments in this proceeding.

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<sup>8</sup>Snyder's refiling was necessary because of loss of site. See, *Evergreen Broadcasting Company*, 6 FCC Rcd. 5599, 5603 (1991).

<sup>9</sup>*Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd. 7094, 7096 ¶ 14 (1990). (*"Modification Recon."*)

<sup>10</sup>See, *Modification Recon.* at 7098 n. 11.

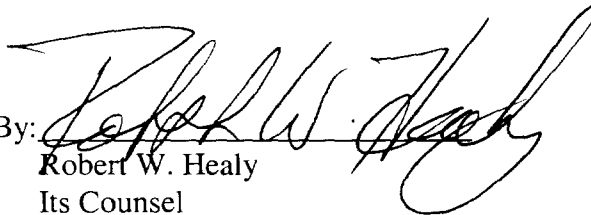
<sup>11</sup>Heftel's reliance on *FCC v. Allentown Broadcasting*, 394 U.S. 358, 361 (1955) is inapposite because AM station applications do not need to meet the same tests as FM rulemaking allotments.

### **III. Conclusion.**

Heftel obviously recognizes that had the *Pinewood* doctrine been applied to its 97-91 Petition, it should never have been given *nunc pro tunc* reinstatement treatment. Heftel, therefore, in its Opposition desperately tries to distinguish *Pinewood*, but fails to do so. Therefore, in light of the *Pinewood* doctrine, the *Order* should be reversed and Heftel's 97-91 Petition dismissed.

Respectfully submitted,

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October 22, 1998

**CERTIFICATE OF SERVICE**

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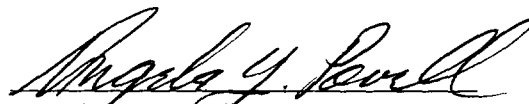
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